IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 178 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE M.C.PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THAKOR BHARATJI ISHWARJI

Versus

STATE OF GUJARAT

Appearance:
MR PM VYAS for the appellant
Ms. Hansa Punani APP for Respondent

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE M.C.PATEL

Date of decision: 10/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. Appellants, original accused Nos. 1 and 4, in

this appeal filed under Section 374 of the Code of Criminal Procedure ('Code' for short), have challenged their conviction under Section 302 read with Sections 34 and 114 of the Indian Penal Code ('IPC' for short) and sentence imposed on each of them to undergo R.I. for life and fine of Rs.2000 in default R.I. for three months, recorded by the learned Additional Sessions Judge, Mehsana, in Sessions Case No.261 of 1991, by judgment and order dated December 30, 1995.

2. Briefly stated, the prosecution case is as under: P.W.2, Pratapji, and Shambhuji Mohanji (hereinafter to be referred to as 'deceased') along with their other brothers were staying in village Dabhoda, Taluka Kheralu, and were selling milk and doing agricultural work. On April 26, 1992, around 8 p.m. deceased Shambhuji had gone to the house of P.W.2, Pratapji, and had told him to accompany him to collect money from the dairy situated in village Dabhoda. P.W.2, Pratapji, had told the deceased that deceased Shambhuji should go and collect money and he would be following him immediately. When deceased Shambhuji reached near the house of one Chehraji Revaji, the appellants and other two accused persons, who are acquitted by the learned Additional Sessions Judge, namely. (i) Mafaji Talaji and (ii) Dudaji Jawanji, rushed towards deceased Shambhuji. The appellant No.1, Bharatji, was carrying a tin with kerosene. The appellant No.1 had poured kerosene on the body of deceased Shambhuji whereas the appellant No.4, Dashrathji, had lighted a match-stick, and the deceased was set on fire. It is the case of the complainant, P.W.2, Pratapji, that acquitted accused, Mafaji Talaji and Dudaji Jawanji, had caught hold of the deceased while the appellant No.1, Bharatji, and the appellant No.4 had poured kerosene and lighted match-stick. As per the say of P.W.2, Pratapji, when four accused persons had poured kerosene and lighted match-stick, he was at a distance of 15 feet. There was a huge fire and due to burn injuries the deceased had raised shouts and, therefore, the appellants and other two accused persons had run away towards their agricultural field. All the accused persons were known to the deceased and the complainant, P.W.2, Pratapji. There was previous long drawn enmity between the side of the deceased and the appellants and many cases were filed against each other. Due to raising of shouts, P.W.4, Dipaji Hariji, had rushed to the place of the incident where the deceased was set on fire. P.W.2, Pratapji, with the help of P.W.4, Dipaji Hariji, had sprinkled water and sand on the body of the deceased and had tried to extinguish the fire. The deceased had sustained severe burn injuries due to pouring of kerosene

on his body by the appellants and setting him on fire. P.W.2, Pratapji, had called a jeep of P.W.3, Thakore Laxmanji, and, in his jeep, the deceased was removed to the Primary Health Center, Kheralu, where, after giving preliminary treatment, he was removed to the Civil Hospital, Mehsana. P.W.2, Pratapji, had lodged First Information Report against the appellants and other two accused persons in the Civil Hospital, Mehsana, which was recorded by P.W.11, Police Head Constable, Rajibhai Chowdhary, which was registered at C.R.I-75 of 1992 of Kheralu Police Station. Investigation of the above crime was handed over to P.W.9, PSI, N.D.Dodiya, of Kheralu Police Station. When the deceased was shifted to the Civil Hospital, Mehsana, yadi with a request to record dying declaration of the deceased was sent to P.W.1, Dahyabhai Joitaram Patel, who was at the relevant time discharging his duties as Executive Magistrate, at Mehsana. The said yadi was received by P.W.1, Mr. D.J. Patel, around 1.30 a.m. P.W.1, Mr. D.J. Patel, had, on receipt of the yadi, had immediately gone to the Civil Hospital, Mehsana, where, he had contacted the Medical Officer on duty and, on being satisfied that the deceased was in a fit state of mind and was conscious, had recorded dying declaration of the deceased between 1.45 a.m. and 2.05 a.m. As the burn injuries sustained by the deceased were of serious nature, he was shifted to the Civil Hospital, Ahmedabad, on May 5, 1992. During the treatment at the Civil Hospital, Ahmedabad, the deceased succumbed to the burn injuries on June 23, 1992. Inquest was held by Shahibaug Police Station and the dead body of the deceased was sent for post-mortem to the Forensic Department of the Civil Hospital, Ahmedabad, where autopsy was performed by P.W.5, Dr. V.V. Patil. P.W.8, PSI, N.D. Dodiya, had sent incriminating articles collected during investigation to the Forensic Science Laboratory and after receipt of the report from the Forensic Science Laboratory as well as post-mortem reports, injury certificates and other case papers of the treatment given to the deceased, had filed chargesheet against the accused persons in the Court of the learned Judicial Magistrate, First Class, Kheralu, under Sections 302, 34 and 114 of the Indian Penal Code, which was registered as Criminal Case No.461 of 1992. As the offence under Section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions Judge, the learned Judicial Magistrate, First Class, committed the case to the Court of Sessions, Mehsana, where it came to be numbered as Sessions Case No.261 of 1992.

3. Charge Exh.6 was framed against the appellants

and other two accused for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code. On completion of recording of evidence of the prosecution, the learned Additional Sessions Judge, by judgment and order dated September 14, 1993, had convicted the present appellant No.1 and the present appellant No.4 for the offences under Section 326 read with Section 34 of the Indian Penal Code and sentenced each of them to suffer R.I. for five years and fine of Rs.200 in default R.I. for six months. The accused Nos. 2 and 3, Mafaji Talaji and Dudaji Jawanji, were acquitted from the charges against them under Section 302 read with Section 34 of the Indian Penal Code.

4. The said order of conviction and sentence was challenged by the appellants in this Court by filing Criminal Appeal No.1138 of 1993 whereas the State of Gujarat had filed Criminal Appeal No.1148 of 1993 against the order of acquittal recorded by the learned Additional Sessions Judge, Mehsana, in favour of the original accused Nos. 2 and 3.

5. Both the appeals were heard and disposed of by the Court (B.C. Patel & M.R. Calla, JJ. as they then were) by common judgment and order dated May 2, 1995, whereby the Court remanded the case, being Sessions Case No.261 of 1992, to the Court of the learned Additional Sessions Judge, with the direction to frame proper charge and to hold fresh trial in accordance with law.

6. After the remand, fresh charge Exh.58 was framed against the appellants and other two accused persons for the offence under Section 302 read with Section 114 of the Indian Penal Code and, in the alternative, under Section 302 read with Section 34 of the Indian Penal Code. The charge was read over and explained to all the accused wherein they pleaded not guilty and claimed to be tried. The prosecution, in order to prove the charges framed against the accused persons, examined: (1) P.W.1, Executive Magistrate, Dahyaram Joitaram Patel, Exh.68; (2) P.W.2, complainant, Pratapji Mohanji Thakore, Exh.69; (3) P.W.3, Laxmanji Shankarji Thakore, Exh.70; (4) P.W.4, Dipaji Hariji, Exh.72; (5) P.W.5, Dr. V.V. Patil, of Forensic Department, Civil Hospital, Ahmedabad, Exh.73; (6) P.W.6, Circle Inspector, Mohanbhai Kacharabhai Vankar, Exh.74; (7) P.W.7, Panch, Mohmad Huseinbhai Sindhi, Exh.75; (8) P.W.8, Dr. Tushar M. Setalvad, Medical Officer of Kheralu Community Health Center, Exh.79; (9) P.W.9, IO, PSI, Mr. N.D.Dodiya, of Kheralu Police Station, Exh.80; (10) P.W.10, Dr. Suresh G. Patel, Medical Officer, Mehsana Civil Hospital, Exh.82,

and (11) P.W.11, Police Head Constable, Ramjibhai Kamraj of Kheralu Police Station, who had recorded First Information Report of P.W.2, Pratapji. The prosecution also produced documentary evidence such as First Information Report, inquest panchanama, panchanama of place of incident, post-mortem notes, discovery panchanama of recovery of tin of kerosene, map of place of incident, injury certificate and other medical case papers of the deceased of Community Health Center, Kheralu, Civil Hospital, Mehsana, Civil Hospital, Ahmedabad, to prove the charge against the appellants and other two accused persons.

7. After the evidence of the prosecution was over, all the accused persons were questioned generally and their statements came to be recorded under Section 313 of the Code. The defence of the accused persons was of general denial.

8. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence and the arguments advanced by the learned Additional Public Prosecutor and the learned advocate for the accused persons, deduced that it was proved that: (1) the dying declaration of the deceased recorded by P.W.1, Executive Magistrate, D.J. Patel, was reliable and trust-worthy which had proved that the present appellants had poured kerosene on the deceased and set him on fire as a result of which the deceased had sustained serious burn injuries and, according to the medical evidence of the Doctors, who had treated the deceased, the said burn injuries were sufficient in the ordinary course of nature to cause death; (2) the deceased had died homicidal death; (2) the appellants Nos. 1 and 2 with intention and full knowledge had poured kerosene on the deceased and set him on fire and, therefore, the appellants had committed offence of committing murder of the deceased. On the basis of the abovereferred to conclusions, the learned Additional Sessions Judge acquitted accused No.2 and 3, namely, Mafaji Talaji and Dudaji Jawanji, from the charges framed against them under Sections 302, read with Section 34 of the Indian Penal Code. However, the learned Additional Sessions Judge convicted the appellants under Sections 302 read with Section 114 of the Indian Penal Code and sentenced them to undergo R.I. for life and fine of Rs.2000 in default R.I. for three months, which has given rise to filing of the present appeal by the appellants.

9. It may be mentioned that the State of Gujarat had filed Criminal Appeal No.200 of 1996 against the

acquittal of the original accused Nos. 2 and 3 recorded by the learned Additional Sessions Judge by the impugned judgment and order. The said appeal was summarily dismissed by the Court (Coram: K.J. Vaidya and D.G.Karia, JJ. as they then were) by order dated September 2, 1996.

10. Learned counsel Mr. P.M.Vyas, for the appellant and learned APP, Mr. Hansa Punani, have taken us through the entire record and proceedings of the Sessions Case.

11. Learned counsel Mr. P.M.Vyas, for the appellant, has submitted that there is contradiction in the dying declaration recorded of the deceased in comparison with the oral testimony of the complainant, P.W.2, Pratapji Mohanji Thakore, and, therefore, benefit of doubt should be given to the appellant, and the appeal be allowed and the conviction and sentence be quashed and set aside. Learned counsel Mr. P.M.Vyas, for the appellant, has also submitted that the conviction cannot be based solely on the dying declaration of the deceased because it was not corroborated by any other independent evidence and, therefore also, the impugned judgment deserves to be quashed and set aside, and the appeal be allowed accordingly.

12. We have heard learned APP, Ms. Hansa Punani, for the respondent-State.

13. The learned Additional Sessions Judge has recorded the finding that deceased Shambhuji Mohanji had died homicidal death on the basis of oral as well as documentary evidence in the nature of oral testimony of P.W.5, Dr. V.V. Patil, of Forensic Department, Civil Hospital, Ahmedabad, P.W.8, Dr. Tushar M. Setalvad, Medical Officer of Kheralu Community Health Center, and P.W.10, Dr. Suresh G. Patel, Medical Officer, Mehsana Civil Hospital. All the three Medical Officers have categorically deposed that the deceased had died due to the burn injuries. This is not a case of accidental or suicidal death. The dying declaration of the deceased produced at Exh20 had proved beyond doubt that the deceased had died due to burn injuries as a result of appellants having poured kerosene on him and setting him on fire by lighting match-stick. The post-mortem notes produced at Exh.43 coupled with other medical case papers of different hospitals also proved beyond doubt that the deceased died due to burn injuries which is sufficient in the ordinary course of nature to cause death. Therefore, we are of the opinion that the finding of the learned

Additional Sessions Judge that deceased Shambhuji Mohanji had died homicidal death, deserves to be confirmed.

14. In the case of Jai Karan vs. State of Delhi (NCT), (1999) 8 Supreme Court Cases 161, the Supreme Court held as under:

"A dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premiss that ordinarily a dying person will not falsely implicate an innocent person in the commission of a serious crime. It is this premiss which is considered strong enough to set off the need that the maker of the statement should state so on oath and be cross-examined by the person who is sought to be implicated. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on a strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence neither extra strong nor weak - and can be acted upon without corroboration if it is found to be otherwise true and reliable. [Padmaben Shamalbhai Patel vs. State of Gujarat (1991) 1 SCC 744 : 1991 SCC (Cri) 275]"

Further, in the case of Paniben vs. State of Gujarat, (1992) 2 SCC 474, the Supreme Court summed up the principles of dying declaration with the following observations:

"Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature so as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind

after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgements the principles governing dying declaration, which could be summed up as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration (Munnu Raja vs. State of M.P: (1976) 3 SCC 104).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration (State of U.P. vs. Ram Sagar Yadav: (1985) 1 SCC 552: Ramavati Devi vs. State of Bihar: (1983) 1 SCC 211)

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy vs. Public Prosecutor: (1976) 3 SCC 618)

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg vs. State of M.P : (1974) 4 SCC 264).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected (Kake Singh vs. State of M.P. : 1981 Suppl SCC 25)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. (1981) 2 SCC 654)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu : 1980 Supp SCC 455)

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Ojha v. State of Bihar: 1980 Suppl SCC 769)

(ix) Normally the courts in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State

of M.P.: 1988 Supp SCC 152)
(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon (State of U.P. vs. Madan Mohan : (1989) 3 SCC 390)"

15. In the light of the above principles, we will now consider the dying declaration of the deceased recorded by P.W.1, Executive Magistrate, Dahyaram Joitaram Patel, produced at Exh.20. P.W.1, D.J. Patil, had received yadi from the Mehsana Police Station around 1.30 a.m. on April 27, 1992. There was an endorsement of the Doctor that the patient was conscious at 1.30 a.m. on April 27, 1992. P.W.10, Dr. Suresh G. Patel, who was at the relevant time serving as Medical Officer, in Mehsana Civil Hospital, in his oral testimony deposed that, after examining the deceased in the hospital, he had made the endorsement in the yadi at Exh.19 that the patient was conscious at 1.30 a.m. He had further deposed that, when the Executive Magistrate had come to record dying declaration of the deceased, he had examined the deceased and had found him conscious and in a fit state of mind to make dying declaration. P.W.1, D.J. Patel, has also deposed that he had also found that the patient was conscious at 1.30 a.m. and, on being satisfied that the patient was conscious and well oriented, he had started recording the declaration. He has also deposed that he had taken all the precautions that no relative or any other person was around the deceased. The evidence of P.W.1, Executive Magistrate, Dahyaram Joitaram Patel, and P.W.10, Dr. Suresh G. Patel, has not been dislodged in cross examination also. We are satisfied that all the precautions were taken before recording dying declaration and we are further satisfied that the said dying declaration is trust-worthy and reliable. In the said dying declaration, the deceased had stated that Thakor Bharatji Ishwarji and Thakore Dashrathji Ishwarji are residents of village Dabhoda, and there was old enmity between the aforesaid two persons and the deceased. On the night of April 26, 1992 around 8 p.m. he along with his brother, Pratapji, had gone to Dudhsagar Dairy to collect money, and, while they were proceeding in the direction of Dudhsagar Dairy and when they had reached near the house of one Thakore Chehraji Ravaji, the abovenamed two persons and two unknown persons had poured kerosene on him and set him ablaze. After setting him ablaze, the abovenamed two persons, i.e. appellants Thakor Bharatji Ishwarji and Thakore Dashrathji Ishwarji - and two unknown persons had run away. As he had sustained burn injuries, he had raised shouts and, thereafter, his brother, Pratapji, had sprinkled water

and sand on his body and had extinguished fire. In his dying declaration, the deceased had specifically stated that, at the time of the incident, his brother, Pratapji, had accompanied him and, when he had raised shouts, other persons of the village had assembled there. The deceased, in his dying declaration, had further submitted that he had old enmity with the appellants and, therefore, in order to take revenge of the old enmity, they had set him ablaze. The dying declaration produced at Exh.20, in our view, had clearly proved that the appellants were the assailants who had poured kerosene on the deceased and had set him ablaze and the appellants had aided and abetted each other in causing fatal burn injuries on the deceased. The dying declaration had satisfied all the tests laid down by the Apex Court in various decisions as referred to hereinabove. We are satisfied that the dying declaration is trust worthy and reliable and it is proved beyond doubt that the appellant and the appellants alone with the help of each other had set the appellants ablaze by pouring kerosene on him which has resulted into his death.

16. The dying declaration gets corroboration from the oral testimony of P.W.8, Dr. Tushar M. Setalvad, who was at the relevant time serving as Medical Officer of Kheralu Community Health Center. The deceased, after sustaining burn injuries, was removed to Kheralu Community Health Center around 9 p.m. in the jeep of P.W.3, Laxmanji Shankarji Thakore. P.W.8, Dr. Tushar M. Setalvad, at the time of examination of the deceased, had asked about the burn injuries sustained by him, and, on interrogation, the deceased had disclosed that he had sustained burn injuries because Thakor Bharatji Ishwarji and Thakore Dashrathji Ishwarji had set him ablaze and had caused burn injuries. The history narrated by the deceased was reduced in writing by P.W.8, Dr. Tushar M. Setalvad, in the case papers of the Community Health Center which are produced at Exh.35. Therefore, the dying declaration is fully corroborated by the history narrated by the deceased before P.W.8, Dr. Tushar M. Setalvad, Medical Officer, at the earliest point of time, when he was first examined by the said Doctor. The naration of the history of sustaining burn injuries by the deceased before P.W.8, Dr. Setalvad, had become a dying declaration after his death in view of the provisions of Section 32 of the Indian Evidence Act.

17. The submission of the learned counsel for the appellants that there is contradiction in the evidence of P.W.2, Pratapji and the dying declaration, does not deserve any merit and deserves to be rejected. The

deceased himself in his dying declaration had disclosed the names of the appellants as persons who had poured kerosene on him and set him ablaze. Even though the deceased had survived for one month twenty seven days after the incident, he could not give the names of other two unknown persons. The Division Bench, while summarily dismissing the appeal against the acquittal of the said two accused persons, had also observed that the testimony of P.W.2, Pratap, was not reliable as it was not supported by any other evidence. As held earlier, the dying declaration had proved beyond doubt that the appellants were the only persons who had poured kerosene on the deceased and set him ablaze which has caused his death. The learned Additional Sessions Judge has rightly not believed the evidence of P.W.2, Pratap. We do not find any contradiction in the dying declaration and the oral testimony of P.W.2, Pratap, so far as these two appellants are concerned

18. The learned counsel for the appellants has also submitted that, as the deceased had survived for one month and twenty seven days after sustaining the burn injuries, it should be held that the appellants had not committed offence under Section 302 of the Indian Penal Code, and, at the most, it can be held that the deceased had died due to some other complications and, therefore, the death was not the direct consequence of the burn injuries sustained by the deceased. The above submissions of the learned counsel for the appellants also deserves to be rejected. The medical evidence of the Doctors who had treated the deceased at Kheralu Community Health Center and Mehsana General Hospital, had proved beyond doubt that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death. The deceased had survived for one month twenty seven days because of extensive treatment given to him by different hospitals and the death had taken place as a direct consequence of extensive burn injuries sustained by the deceased due to pouring of kerosene by the appellants and setting him ablaze. The appellants had full knowledge and intention that by pouring kerosene and setting the deceased ablaze was likely to cause his death. There was motive on the part of the appellants to commit the murder of the deceased because of the old enmity between the appellants and the deceased. On reappreciation of evidence, we are satisfied that there is no infirmity in the findings recorded by the learned Additional Sessions Judge for convicting and sentencing the appellants.

19. For the foregoing reasons, we do not find any substance in the appeal. The appeal, therefore, fails and is dismissed. The conviction of the appellants under Section 302 read with Sections 34 and 114 of the Indian Penal Code and sentence imposed on each of them to undergo R.I. for life and fine of Rs.2000 in default R.I. for three months, recorded by the learned Additional Sessions Judge, Mehsana, in Sessions Case No.261 of 1991, by judgment and order dated December 30, 1995, are hereby confirmed. The muddamal be destroyed in terms of directions given in the impugned judgment and order.

(M.H. Kadri, J.)

(M.C.Patel, J.)

(swamy)